Moving beyond the Equality Act: a call for trans* affirming structural change and gender expansive education in schools.

In light of the pivotal role which early school experiences play in shaping persons' world-views, trans-affirming school spaces are ideal sites for advancing trans emancipation on a societal scale. Research shows that feelings of belonging at school correlate with trans pupils' levels of academic motivation and achievement.[1] There is also evidence that trans children who feel supported in their social transition experience good levels of mental health,[2] in spite of the high rates of self-harm and suicide which persist among trans youth today.[3] Sadly, a review of 83 empirical studies on the school experiences of trans youth shows that only a minority had affirming experiences overall.[4] Instead school environments are more often hostile settings which expose trans youth to institutional macroaggressions, institutional microaggressions, and cisnormative violence.[5] In the face of this reality, this essay considers whether the current legal landscape goes far enough to safeguard trans children in school spaces. Part A examines the protections for trans pupils conferred by the Equality Act 2010 ('EA'), concluding that these protections are based on a model of adaptation-upon-request which fails adequately to safeguard trans children. Part B argues for a new statutory scheme which will depart from our current *reactive accommodation-focused* approach and instead signal a pedagogical commitment to *preemptive affirmation* of gender diverse identities. A non-exhaustive list of reform proposals to improve the position of trans pupils in schools is included.

Terminology

'Trans' (or trans*) is used in this essay as a shorthand expression to describe any person whose gender identity is not entirely consistent with that which was assigned to them at birth. It may be contrasted with 'cis' — a shorthand used to describe someone who is not trans. As an umbrella term, 'trans' can encompass any range of gender identities, such as transgender, non-binary, gender fluid, agender and genderqueer.

It must be noted that despite being the main piece of UK legislation operating to protect the rights of trans people, the Equality Act 2010 relies on dated terminology. It uses the term 'transsexual' rather than 'trans' or 'transgender', arguably conflating 'sex' with 'gender'. Moreover, non-binary and gender fluid persons who do not identify with either gender are not explicitly protected through the EA, which refers to the protected characteristic of 'gender reassignment' rather than 'gender identity'. In recent years, judges have been driven to remedy these deficiencies. Judgments have preferred the term 'transgender' over the term 'transsexual'[6] and it has been held that non-binary and gender fluid identities fall within the section 7

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[1] Jacqueline Ullman, '*Free to Be? Exploring the Schooling Experiences of Australia's Sexuality and Gender Diverse Secondary School Students'* (2015) NSW Centre for Educational Research, Western Sydney University.

[2] Diane Ehrensaft et al, 'Prepubertal social gender transitions' [2018] *Int. J. Transgenderism* 19, 251–268; Lily Durwood et al, 'Mental health and self-worth in socially transitioned transgender youth' [2017] *J. Am. Acad. Child Adolesc. Psychiatry* 56, 116–123.

[3] Stonewall, 'Trans Key Stats', accessed 19 Sep 2021.

[4] Ruari-Santiago McBride, 'A literature review of the secondary school experiences of trans youth' [2020] *J. LGBT Youth* 1–32.

[5] Ibid.

[6] See Bell v Tavistock [2021] EWCA Civ 1363 and AB and CD and Ors [2021] EWHC 741 (Fam)

definition of 'gender reassignment'.[7] Beyond the substantive benefits which legal reform in this area would provide, it could also serve to bring the relevant legal terminology up to date.

Part A: Current protections for trans pupils in the Equality Act 2010

The relevant legislation in this area is the Equality Act 2010. 'Gender reassignment' is a protected characteristic under section 7. The Act states that 'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.' Since merely 'proposing to undergo' gender reassignment is enough to trigger the protections of the EA, and in light of the reference to 'other attributes of sex', an individual who is merely socially transitioning is protected. As highlighted in the recent case *Bell v Tavistock*,[8] 'The treatment of children for gender dysphoria is controversial. Medical opinion is far from unanimous about the wisdom of embarking on treatment before adulthood.' The broad definition of 'gender reassignment' in section 7 ensures that regardless of whether they are undergoing any physiological or medical transition, trans youth are able to benefit from the prohibitions on discrimination in the EA.

Nonetheless, the duties imposed on schools with respect to trans pupils are predominantly negative and driven by a focus on accommodating pupils who have come out, rather than mandating proactive trans-affirming structural change. Part 6, Chapter 1 of the EA applies specifically to schools, prohibiting discrimination and victimisation of pupils on the basis of them having the protected characteristic of gender reassignment. For example, a trans pupil who is refused entry into the restroom of their affirmed gender could be protected through several EA provisions. If they are refused entry on the basis of being trans, this would be direct discrimination under section 13. In the alternative, if entry is seen to be refused on the grounds that the pupil's body is not yet somatically consistent with social perceptions of what their affirmed gender looks like, this could ground an argument that there was indirect discrimination under section 19(2), unless the school board could prove that the refusal of entry was 'a proportionate means of achieving a legitimate aim'. Finally, the pupil could argue that the school breached its statutory duty under section 85(6) to 'make reasonable adjustments' to accommodate them.

While a duty to consider adopting trans-affirming policies preemptively is placed on some schools through the Public Sector Equality Duty ('PSED') which is found in section 149 EA, there is no positive obligation actually to implement such policies. The PSED obliges all public authorities — including maintained schools — in the exercise of their functions to 'have due regard' to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those persons who share a relevant protected characteristic and those who do not. Gender reassignment is one of the protected characteristics with respect to which the PSED applies. Thus, the PSED imposes only a duty to *consider* the need to meet the stated objectives in respect of trans students; it does not impose any positive duty to *act*. It has been emphasised that the courts must not 'micro-manage' the exercise of this duty:[9] provided the observance of the duty has been given 'sufficient consideration', the court should defer to the

[7] Taylor v Jaguar Land Rover Limited (Birmingham ET 1304471/2018 14.9.20)
[8] [2021] EWCA Civ 1363
[9] R (Greenwich Law Centre) v Greenwich London Borough Council [2012] EWCA Civ [29-30]

judgment of the decision-maker.[10] For example, if an addressee of the PSED was building new changing facilities in a school, there would be no obligation to provide gender neutral facilities in order to meet the needs of future trans pupils, so long as this possibility was considered.

Thus, the EA places the onus on the individual pupil coming out and requesting trans friendly policies in order to claim their rights. Indeed, Davy and Cordoba document that few schools in the UK have trans-inclusive policies prior to having an out trans student.[11] The status quo places the trans pupil in the position of the 'sacrificial lamb'[12]: it risks their right to privacy and equality of education before schools can commence the necessary adaptations. It assumes that trans children are able to operate as adults in demanding access or modifications to restrooms, changing rooms and other gender-segregated spaces. It also pathologises gender diversity as being out of the "norm" and requiring "special treatment", thus reinforcing cisgender privilege. Finally, this approach assumes that a gender diverse pupil knows which accommodations they require, which may not always be the case. For example, a pupil may be in the process of questioning or exploring their gender identity. Overall, the reactive, adaptation-on-request policy which underlies the EA leaves a problematic cisgenderist system intact and cannot drive pre-emptive trans affirming structural change.

Part B: Moving beyond the Equality Act

As early as 2017, the Chair of the Equality and Human Rights Commission ('EHRC') noted that trans youth were being 'failed by the system' and pledged the publication of practical guidance for schools to address the needs of trans pupils.[13] A draft guidance document was leaked to the press in 2019 and seized upon by gender critical campaign groups. Subsequently, in May 2021, a spokesperson for the EHRC announced that the project had been dropped as the law was 'too uncertain'.[14] This justification appears to contradict the EHRC's mission statement that it aims 'to clarify the law, so people and organisations have a clearer understanding of their rights and duties'.[15] It is difficult to avoid the impression that the Commission caved in the face of gender-critical opposition.

In light of the marked failure of regulation adequately to address the needs of trans youth, it is proposed that a statutory scheme is required. Unlike any guidance document, this would legally bind school boards to initiate trans affirming structural changes. Broadly speaking, the new statutory scheme should purport to eliminate gender-segregated school spaces and require the introduction of trans-inclusive curricula.

The detail of reform might include — but need not be limited to — the following proposals.

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[10] R (C) v Secretary of State for Work and Pensions [2014] EWHC 2403 (Admin) [118]
[11] Zowie Davy and Sebastian Cordoba, 'School cultures and trans and gender-diverse children' [2019] *J. GLBT Fam. Stud*. 16, 1–19.
[12] Elizabeth Meyer et al, 'Transgender and gender-creative students in PK-12 schools' [2016] *Teach. Coll. Rec* 118, 1–50.
[13] Equality and Human Rights Commission. 'Transgender children failed by the system, warns equality Chair' (05 Nov 2017) accessed 20 Sep 2021.
[14] Ewan Somerville, 'Transgender guidelines for girls schools quietly scrapped by the equalities watchdog' (*The Telegraph*, 09 May 2021) accessed 20 Sep 2021.
[15] Equality and Human Rights Commission, 'Our Powers', accessed 19 Sep 2021.

Proposal 1: Toilets and changing facilities

Gender-segregated toilet and changing spaces can be environmental stressors for trans youth.[16] While the School Premises (England) Regulations 2012 specify that separate toilet facilities must be provided for boys and girls who are over the age of eight, an exception is made where toilets can be secured from the inside and are intended for use by one pupil at a time. In a similar vein, the provision of secure gender-neutral changing cubicles would satisfy the requirement for 'suitable changing accommodation' in section 4 of the Regulations. **It is proposed that school boards should be fixed with a statutory duty to install gender-neutral lavatories and changing rooms where possible.**

Proposal 2: Sports

Despite many mixed schools choosing to segregate pupils during physical education classes based on their gender, this is not required by law. **It is proposed that separation based on gender during physical education classes should only be permitted where an exception in section 195 of the EA applies: where separation is required for the safety of competitors or for fair competition.** In practice, this means that physical education would predominantly be carried out in mixed-gender groups, while separation would exceptionally be allowed in teaching contact sports to post-pubescent youth, or during sporting competitions. The question whether trans pupils should be allowed to join the group of their affirmed gender in these exceptional cases lies beyond the scope of this essay and is likely to be decided on a case-by-case basis.

Proposal 3: Uniforms

Although the Welsh government has previously issued statutory guidelines that all school uniforms must be gender neutral,[17] nothing similar exists in England. **It is proposed that school boards should be fixed with a statutory duty to ensure that all school uniforms are gender neutral.**

Proposal 4: Curricula

It has been found that in schools with LGBT-inclusive curricula, negative comments about trans people are less likely to be heard.[18] In 2019, the Department of Education issued statutory guidance stating the expectation that all pupils will be taught LGBT content in the context of Relationships and Sex Education (RSE).[19] Despite this, the guidance is not suited to ensuring that trans-affirming content is included in the school curriculum. First, lumping together 'LGBT' identities is unhelpful in this context. In an

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[16] Jennifer Ingrey, 'Problematizing the cisgendering of school washroom space' [2018] *Gend. Educ.* 30, 1–16.
[17] BBC, 'Welsh school uniforms to be cheaper and gender neutral' (*BBC News*, 10 Jul 2019) accessed 20 Sep 2021.
[18] Joseph Kosciw et al, 'The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools' (*GLSEN*, 2018) 70.
[19] Department for Education, 'Relationships Education, Relationships and Sex Education (RSE) and Health Education' (2019).

SRE class, discussion regarding sexuality is likely to be prioritised over discussion on gender identity. Second, the guidance provides schools with rationales for not delivering LGBT content. For example, it states that 'the religious background of all pupils must be taken into account when planning teaching' and that 'schools with a religious character may teach the distinctive faith perspective on relationships'. These statements may be relied on by religious schools in refusing to teach LGBT content. Moreover, it is said that 'schools should ensure that all of their teaching is sensitive and age appropriate in approach and content'. Describing the teaching of LGBT issues as 'sensitive' and potentially not 'age appropriate' stigmatises LGBT identities by suggesting that young children must be shielded from exposure to these issues. **It is suggested that school boards should be fixed with a strict statutory duty to include specifically trans-affirming content and discussion in the school curriculum.** This measure is key in helping trans students to feel seen, while simultaneously promoting understanding between pupils identifying as cis and those who identify as trans.

Crucially, while the foregoing measures would be helpful for trans children, they should not be viewed specifically as '<u>trans measures</u>'. For example, gender neutral uniforms, the availability of secured toilets and changing facilities and the opportunity to play sports in mixed groups would be beneficial to *all* pupils, whether they identify as trans or not. Rather than attempting to accommodate trans children within a cisgenderist system, the proposed changes are aimed at dismantling systems of gender segregation and interrogating gender hierarchies.

Conclusion

The focus of the Equality Act 2010 on accommodating trans children within cisgenderist school systems puts trans students at a systemic educational disadvantage. The EA places predominantly negative obligations on schools, which become relevant only in the presence of a trans student who is out and asks to be accommodated. Thus, the status quo fails to safeguard the privacy of trans pupils, treating them as self-asserting adults rather than children. To remedy this deficiency, I proposed that school boards should be fixed with more expansive positive legal obligations. They should be obligated to take a series of positive preemptive steps to improve the experiences of trans pupils — for example, by eliminating gender-segregated spaces and uniforms. Trans-inclusive curricula must also be secured. This is the best way to ensure greater equality for trans pupils and a true pedagogical commitment to promoting gender diversity.

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